

Department of State Health Services
Agenda Item for State Health Services Council
September 15, 2005

Agenda Item Title: Amendments and a Repeal to 25 TAC Chapter 31, Subchapters B and C, Related to the Farmers' Market Nutrition Program (FMNP) and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC)

Agenda Number: 4a

Recommended Council Action:

☐ For Discussion Only

☒ For Discussion and Action by the Council

Background: WIC provides healthy supplemental foods, including infant formula, nutrition education, breastfeeding promotion and support, and help to clients in accessing other health and human services (See attached WIC Overview Power Point Presentation). WIC serves almost 900,000 low-income pregnant and postpartum women, infants, and children under age five in Texas each month, including approximately 60% of the infants born in the state. Clients receive supplemental foods by redeeming food vouchers or using electronic benefits cards at authorized grocers. Women and children age one and older are automatically enrolled in the FMNP if they participate at a WIC local agency authorized to provide FMNP services. These clients receive up to \$20 in coupons annually that can be redeemed at local farmers' markets in order to increase clients' consumption of fresh, nutritious fruits and vegetables and to promote the use and awareness of farmers' markets.

The Nutrition Services Section is responsible for rules that affect the public's ability to be certified as eligible to receive WIC or Farmers' Market Nutrition Program (FMNP) benefits, become a WIC or FMNP service delivery provider, or become a farmer or vendor certified to redeem WIC or FMNP benefits. Under federal and state enabling legislation, WIC and FMNP are primarily federally funded and governed by federal law and regulation. The department receives federal grant funds from the United States Department of Agriculture (USDA) to administer the programs, provided the department does so in accordance with federal laws and regulations and in accordance with the department's annual submission of a state plan approved by USDA.

Summary: The rules are being reviewed and considered for readoption in accordance with Government Code, §2001.039. Amendments to the WIC rules are necessary primarily to comply with provisions of Public Law 108-265, the Child Nutrition and WIC Reauthorization Act of 2004, regarding changes to the definitions of nutrition education and supplemental foods and the requirements for management of retail grocers and pharmacies who apply to participate in the program. In addition, the amendments are consistent with the federal 2005 Consolidated Appropriations Act that prohibits the allocation of administrative funds to state agencies operating WIC programs that authorize any new vendors (retail grocers) if it is expected that more than 50% of the vendors' annual revenue from food sales will be from WIC sales. USDA has informed the department that the 2006 appropriations act is expected to contain the same language. Other amendments are being proposed to increase administrative efficiency, to make minor wording changes, to correct errors, and to clarify the content of the rules.

Summary of Stakeholder Input to Date (including advisory committees): All 2508 active vendors (grocers/pharmacies authorized to redeem WIC food vouchers) received two Vendor News Flash bulletins announcing the proposed changes and inviting vendors to comment during the planning stage. The News Flashes were also posted on the WIC web site. All requests from vendors for meetings or telephone conferences with Nutrition Services staff were honored. Nutrition Services Section staff also met with staff of the Health and Human Services Commission, Office of the Inspector General, to draft changes to the rule regarding investigations and sanctioning of WIC clients for program abuse. Members of the Texas Association of Local WIC Directors, representing local health departments, health districts, hospitals, cities, counties, community action agencies, the four health service regions operating WIC services, other state agencies, and other nonprofit organizations, were briefed on the proposed rules changes several times in meetings.

Proposed Motion: Motion to recommend HHSC approval for publication of rules contained in agenda item #4a.

Presented by: Mike Montgomery

Title: Director

Program/Division: Nutrition Services Section

Approved by:

Contact: Valerie Wolfe, ext. 2072

Date Submitted

September 7,
2005

Title 25. HEALTH SERVICES

Part 1. DEPARTMENT OF STATE HEALTH SERVICES

Chapter 31. Nutrition Services

Subchapters B. Farmers' Market Nutrition Program

Amendments §§31.11-31.12

Subchapter C. Special Supplemental Nutrition Program for Women, Infants, and Children (WIC)

Amendments §§31.21-23; §31.25-31.37

Repeal §31.24

PROPOSED PREAMBLE

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes amendments to §§31.11-31.12, §§31.21-31.23, §§31.25-31.37 and the repeal of §31.24 concerning the Farmers' Market Nutrition Program (FMNP) and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC).

BACKGROUND AND PURPOSE

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 31.11-31.12 relating to FMNP and §§31.21-31.23 and §§31.25-31.37 relating to WIC have been reviewed, and the department has determined that reasons for adopting the sections continue to exist in that rules on these subjects are needed. However, the rules require revision as described in this preamble. Section 31.24 has been reviewed and the department has determined that reasons for adopting the section no longer continue to exist.

Under federal and state enabling legislation, the WIC Program is funded entirely by a combination of federal grant funds and by rebates from manufacturers of infant formula and infant cereal that can only be expended to defray WIC food costs. The FMNP is funded by a federal grant and a 30% state match for the administrative portion of the federal grant. The United States Department of Agriculture (USDA) awards federal grant funds to the department to administer the programs, provided the department does so in accordance with federal law and regulations and in accordance with the department's annual submission of a state plan approved by USDA. USDA deems the following types of changes to be substantive amendments to the state plan that require federal approval: rule or policy changes initiated by legislation, USDA, or the state agency; changes affecting client or vendor services and benefits; changes in the monitoring/oversight of vendors and local agencies; any other operational changes aimed at improving or enhancing program delivery or accountability; and changes in related State procedures.

Amendments to these rules are proposed primarily to comply with provisions governing the WIC program in Public Law 108-265, the Child Nutrition and WIC Reauthorization Act of 2004. In addition, these amendments implement the federal 2005 Consolidated Appropriations Act that prohibits the allocation of administrative funds to state agencies operating WIC programs that

authorize any new vendors if it is expected that more than 50 percent of the vendors' annual revenue from food sales will be from WIC sales. USDA has informed the department that it expects that the same prohibition will be included in the 2006 appropriations act.

The department is also amending the rules to conform to the recent changes in department's structure and related terminology, and to improve clarity and consistency in existing language.

SECTION-BY-SECTION SUMMARY

The amendments to §31.11 add definitions of a WIC "local agency" and the "WIC Program", reflect changes in departmental structure and related terminology, and add the citation for Agriculture Code, Chapter 15, which authorizes the department to administer the FMNP.

The amendments to §31.12 add information concerning the design, printing, and denominations of FMNP food coupons; the procedure for the delivery of coupons to recipients; and the procedure for the redemption of coupons by sellers of the produce, as required by Agriculture Code, §15.005. Because §§31.12(b)-(c) and 31.12(e)-(g) relate to internal administration by the department of FMNP agreements and claims for reimbursement, these subsections are being deleted and placed in program policy.

The amendments to §31.21 add, delete, and amend definitions primarily to improve the clarity of the section, to conform the definitions to current department structure and related terminology, and to comply with Public Law 108-265 that revised the definitions of WIC "nutrition education" and "supplemental foods". The new definition of "predominantly-WIC vendor" implements the recent federal requirement that the department identify stores in which WIC sales total, or are expected to total, more than 50 percent of food sales. The definition of "WIC-only store" has been deleted because the new definition of "predominantly-WIC vendor" also includes vendors that sell only WIC foods. A definition of "full-line grocery store" also has been added to facilitate comparisons with "predominantly-WIC vendors." A definition of "pharmacy" was added because the department proposes to exercise the option allowed in federal law to exempt a pharmacy that chooses to provide only exempt infant formula from classification as a "predominantly-WIC vendor." Definitions of "primary contract brand infant formula," "exempt infant formula," and "vendor" have been added to conform to the definitions in federal law and in the regulations governing the program at 7 Code of Federal Regulations (CFR) Part 246.

The amendments to §31.22, regarding WIC Program recipient eligibility, delete definitions of "income" and permissible exclusions from income that merely duplicate WIC federal regulations, and add a citation to the federal regulations. An amendment to §31.22 also clarifies that in some situations WIC applicants may be required to present additional documentation of income to ensure that an applicant's total income can be assessed accurately. Since §31.22(b) states unequivocally that citizenship is not an eligibility requirement for WIC, §31.22(b)(1)-(3) have been deleted as unnecessary.

The amendments to §31.23, regarding recipients of WIC supplemental food benefits, delete the restrictions concerning the number of months of food benefits a proxy designated by a WIC recipient will receive because these restrictions will no longer be necessary in an electronic

benefits transfer system, currently being piloted by the program. The amendment also removes the restriction on proxies assisting residents of homeless shelters, institutions, and other temporary shelters to allow personnel at those entities to assist more than one shelter resident at a time by picking up food benefits at the WIC office and obtaining food benefits from vendors. However the amendment adds language that WIC clients must be encouraged and allowed to participate in the process of picking up and transacting food instruments to the greatest extent possible within the institutional framework and that WIC clients must receive their food benefits at the same time as they receive notice of eligibility as required by the federal regulations governing the program.

Section 31.24, regarding provision of immunizations to WIC applicants and recipients, is being repealed as unnecessary and/or duplicative, because each of the contracts between the department and the WIC service delivery providers includes performance standards concerning provision of immunizations free of charge or referrals to local immunization providers.

The amendment to §31.25, regarding WIC recipients' certification periods, specifies enrollment and certification procedures for receiving benefits.

The amendments to §§31.26-31.28 delete redundant information and make minor nonsubstantive changes to the rules to improve clarity.

The amendments to §31.29 delete the term "suspension", which is no longer current terminology, and conform the rule to the department's fair hearing procedures.

The amendments to §31.30, regarding WIC participant fraud and abuse, align the department's rules with the creation of the Department of State Health Services and the Office of the Inspector General, Health and Human Services Commission.

Section 31.31, relating to selection of WIC service delivery contractors, has been amended by deletion of the detailed criteria and procedures used to rank WIC Program service areas according to relative need. The ranking criteria have been deleted because they concern internal administrative procedures, rather than policies that affect the public. The department will continue to use the criteria to rank service areas' relative need, and deletion of the ranking criteria will afford the department more flexibility to use other kinds of emerging census and health data. Section 31.31 also has been amended by deletion of the criteria for evaluation of proposals by local agencies to become service providers because these specific evaluation criteria are provided to the public in each request for proposal published by the department. Deletion of the evaluation criteria from the section will enable the department to consider and publish other and/or additional criteria as the needs of the department may change.

The amendments to §31.32, relating to the initial selection of vendors for participation in the WIC program, are necessary to comply with provisions of the Child Nutrition and WIC Reauthorization Act of 2004, and the federal fiscal year 2005 Appropriations Act. Specifically, both acts address the proliferation of stores that sell only WIC-authorized food products and data that confirms many of these stores charge higher prices on average than other retail full-line grocery stores. The Child Nutrition and WIC Reauthorization Act requires the program to identify vendor outlets in which WIC sales account for more than 50 percent of total food sales,

and to ensure the prices these vendors charge are competitive with prices charged by vendors operating full-line grocery stores by December 30, 2005. The 2005 Appropriations Act prohibits the allocation of administrative funds to states that authorize any new vendors if it is expected that more than 50 percent of a vendor's annual revenue from food sales will be from WIC sales, unless denial of the vendor's authorization would result in inadequate participant access to WIC services.

The amendments to §31.32 are intended not to eliminate currently authorized "predominantly-WIC" vendors, but to ensure such stores' prices are more competitive with full-line grocery stores. In compliance with federal law, the department seeks to maximize federal WIC grant funds so the WIC program can serve the maximum number of eligible women, infants, and children. In an effort to encourage submission of only complete applications, §31.32(a) has been amended to state that unless a written request for evaluation including the vendor's name, address, contact person, and phone number; the vendor's valid Food Stamp Program authorization number unless the vendor is applying for authorization only to transact exempt infant formula; and a written declaration of the percentage of total food sales expected to be derived from WIC sales must be received and verified before the remainder of a vendor's application for participation in the program will be evaluated. Section 31.32(b) has been amended to authorize the department to disapprove an authorization request if the vendor is not ready at the time the department or contractor staff physically visits the vendor for an on-site evaluation at the mutually agreed upon time. Section 31.32(c) has been amended to add documentation of a current Food Stamp authorization; a declaration that no more than 50% of the vendor's expected sales will be derived from WIC sales; and that the vendor must offer a variety of foods other than WIC foods to the existing criteria required for vendor authorization. An exception to the Food Stamp authorization and the requirement that vendors that elect to provide only exempt infant formula must offer a variety of non-WIC foods was added. Minor changes to the quantities of WIC foods a vendor must stock were made to ensure that a vendor stocks the minimum quantities of milk and infant formula to serve a WIC family adequately. The requirement that all vendors operate at a fixed location was amended to eliminate an exception for mobile stores, because no mobile stores are currently operating in the State, and the program has determined that the exception is no longer necessary for client access in rural areas. The options of tentative authorization for a vendor to redeem WIC food instruments and temporary approval of a vendor's application were deleted in §§31.32(h)-31.32(i) because USDA requires that all vendors must undergo an on-site evaluation prior to authorization. New §31.32(k) implements provisions of the Child Nutrition and WIC Reauthorization Act of 2004 concerning vendors who fail to comply with the expectation upon initial authorization that no more than 50% of the vendor's food sales would be derived from WIC sales. Sections 31.32(k)(1) and 31.32(k)(2) authorize the department to reassess the vendor after four months and to terminate the vendor agreement if the assessment documents that more than 50% of the vendor's food sales during that period were derived from WIC sales. Other amendments to §31.32 are minor wording changes intended to enhance the clarity and integrity of the authorization process.

Amendments to §31.33, regarding reauthorization of WIC vendors for participation, delete the detailed criteria applicable to the department's consideration of a vendor's application for reauthorization. The department will relocate and centralize all the evaluation criteria in WIC

policy, and each vendor agrees to comply with all applicable WIC policies by executing the vendor agreement. Since these criteria for reauthorization of vendor agreements affect only those persons who choose to contract with the department, and not the general public, these provisions need not be adopted and enforced as rules.

The amendments to §31.34, regarding the calculation of WIC vendor competitive pricing data, enable the department to implement administrative procedures authorized by the Child Nutrition and WIC Reauthorization Act of 2004, such as exempting pharmacies that elect to sell only WIC exempt infant formula and no other authorized WIC foods from the competitive pricing criteria applicable to full-line grocers.

In an effort to assure that vendors cannot easily avoid sanctions for program violations, amendments to §31.35 allow more than one outlet to be included in the vendor agreement, but require the vendor to reapply for reauthorization upon cessation of operations at any outlet if the vendor attempts to relocate, in order to ensure the new store meets all the original authorization criteria.

Section 31.36, regarding the right of a local agency or vendor to appeal, has been amended to clarify the date by which the state agency must receive a request for a hearing from a local agency or a vendor.

The amendments to §31.37, regarding the WIC Program's criteria for selection of allowable foods, add low fat evaporated milk as a milk type, and canned peas and lentils as foods that may be authorized for the homeless.

FISCAL NOTE

Mike Montgomery, Director, Nutrition Services Section, has determined that for each calendar year of the first five years the sections are in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the sections as proposed. All activities required by the amendments will be performed by existing department staff and with existing funding. The amendments to §31.32 adding criteria for initial and ongoing authorization of a vendor to participate in the WIC Program implement the strong cost-containment measures mandated by Public Law 108-265, ensuring that WIC food costs and payments to vendors are consistent with competitive retail prices for WIC foods. Although some vendors may choose to reduce the prices they charge the WIC program for allowable foods, total federal grant dollars available to the department will not increase. Savings resulting from lower prices charged by some vendors will only enable the department to serve additional recipients.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Montgomery has also determined that there may be economic costs to small businesses, micro-businesses, and persons (other businesses) who are required to comply with the sections as proposed. However, no small businesses, micro-businesses, or persons are required to comply with these sections as amended in order to operate a retail grocery businesses. Some of the vendors authorized to participate in WIC program may be classified as small businesses or

micro-businesses. Among those vendors, some may lower their prices in order to be authorized or to continue to be authorized. However, the probable economic cost to these businesses cannot be quantified because the number of such businesses, if any, that will find it necessary to lower prices for WIC foods cannot be estimated. Nor can the dollar amounts of any price reductions for WIC foods be estimated because price comparison bands vary across the state. There are no anticipated economic costs to persons, including service delivery contractors, WIC applicants, and WIC recipients because none will be required to alter their practices or actions in order to comply with the sections. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Mr. Montgomery has determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections will be assurance that federal funds will be utilized more cost-effectively to deliver services to WIC recipients.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed amendments and repeal do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Valerie Wolfe, Nutrition Services Section, Division of Family and Community Health, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, 512/458-7444 or by email to Valerie.Wolfe@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

PUBLIC HEARING

In addition, a public hearing to receive comments on the proposal is scheduled for Monday, October 17, 2005, from 9:00 a.m. to 11:00 a.m. at the Department of State Health Services,

Room M-653, 1100 West 49th Street, Austin, Texas 78756. Contact: Valerie Wolfe at 512/458-7444.

STATUTORY AUTHORITY

The amendments and repeal are authorized under Agriculture Code, §15.005, which authorizes the executive commissioner of the Health and Human Services Commission to adopt rules necessary for carrying out the requirements of Chapter 15 concerning the Farmers' Market Nutrition Program. Government Code, §531.0055(e), and Health and Safety Code, §1001.075, also authorize the executive commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Chapter 1001, Health and Safety Code.

The proposed amendments and repeal affect Health and Safety Code, Chapter 1001; Government Code, Chapter 531; and Agriculture Code, Chapter 15.

Section for Repeal.

§31.24. Provision of Immunizations to WIC Applicants and Participants.

Legend: (Proposed Amendments)

Single Underline = Proposed new Language

[Bold Print and Brackets] = Current language proposed for deletion

Regular Print = Current Language

(No change.) No changes are being considered for the designated subdivision.

§31.11. Definitions. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1)-(3) (No change.)

(4) Farmers' market agreement - The formal and legally binding agreement between the Department of State Health Services **[Texas Department of Health]** and a vendor authorized to accept and redeem WIC Farmers' Market Nutrition Program coupons.

(5) Farmers' market nutrition program - Section 17 of the Child Nutrition Act of 1966, as amended, authorizes the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). Subsection 17(m) of the Child Nutrition Act, as amended, authorizes the Farmers' Market Nutrition Program. Chapter 15, Agriculture Code, authorizes the Department of State Health Services to administer the Farmers' Market Nutrition Program in Texas.

(6) Local agency - An entity under contract to the State agency to provide Farmers' Market Nutrition Program services or a Department of State Health Services health services region that provides Farmers' Market Nutrition Program services.

(7)[(6)]State agency - The Department of State Health Services **[Texas Department of Health]** in its role as administrator of the WIC and Farmers' Market Nutrition Programs **[Program]**.

(8) WIC Program - The Special Supplemental Nutrition Program for Women, Infants, and Children.

§31.12. Program Administration. **[Farmers' Market Nutrition Agreement with the State Agency]**

(a) The state agency shall determine the design, printing, and denominations of the food coupons used in the Farmers' Market Nutrition Program (FMNP) in accordance with federal regulations at 7 CFR Part 248.

(1) The design of the food coupons shall be uniform across the state and shall include, at a minimum, the following information:

(A) the last date, not later than November 30 of each year, the recipient may use the coupon;

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(B) a time frame within which farmers' market associations must submit coupons for payment;

(C) a unique, sequential serial number;

(D) a denomination (dollar amount); and

(E) a place the unique identifier of the farmer who sold the food may be added.

(2) Either the state or local agencies may print coupons. Local agencies shall utilize software provided by the State agency for uniformity.

(3) The combined value of all the coupons issued to each recipient or household shall be not less than \$10 and not more than \$20 per year. The state agency shall determine the denominations of food coupons each year based on the funds available to support the program.

(b) Food coupons shall be issued to women and children certified as eligible for the WIC Program and who receive WIC food benefits during the months of March through August at local agencies that contract with the state agency to operate the FMNP.

(1) Recipients must present their WIC identification cards to receive FMNP coupons.

(2) Recipients shall receive written information on the program including:

(A) a list of authorized markets at which coupons may be redeemed;

(B) a harvest schedule listing the dates fresh fruits and vegetables are expected to be available in the community during the months the coupons are valid;

(C) instructions stating that:

(i) coupons shall be countersigned only at the time the coupons are redeemed;

(ii) lost coupons will not be replaced; and

(D) notification that no cash change will be given if coupons are redeemed for less than their face value. Local agencies shall also notify recipients verbally that cash change will not be provided when coupons are redeemed for less than their face value.

(c) Farmers' market associations shall submit requests for payment to the state agency.

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(1) Each farmers' market association shall submit at least one claim form (a State of Texas Purchase Voucher) to the state agency each month. Claim forms may be submitted more frequently if necessary.

(2) A redemption list detailing the individual farmer identification numbers and amounts of coupons redeemed by each farmer shall be included with each voucher/claim form.

(3) The state agency shall provide a handbook for farmers and farmers' market associations describing the process for submission of coupons for payment.

(d)[(a)]Once a farmers' market association has been approved to participate in the Farmers' Market Nutrition Program, a written farmers' market agreement shall be prepared and signed by authorized officials of the state agency and the farmers' market association. Upon receipt by the farmers' market association of the executed and signed agreement, the association and its members may begin accepting coupons.

[(b) The agreement shall be prepared by the state agency and submitted to the farmers' market associations for endorsement.]

[(c) Upon receipt, an official of the farmers' market association shall enter the association's name, address, telephone number, federal income tax number, and State of Texas Comptroller number, and shall sign the agreement on behalf of the association.]

(e)[(d)]The farmers' market association shall complete and execute a FMNP Farmer's Profile and Agreement **[an agreement]** for each member farmer who will be redeeming Farmers' Market Nutrition Program coupons. On the agreement, the association shall assign a unique four digit outlet number to each farmer and shall provide each farmer's mailing address, street address (if different), home and work phone numbers, **[and]** social security number, fax number, and e-mail address. The agreement shall be signed and dated by each farmer and the association official.

[(e) The completed association agreement and the farmer agreements shall be returned to the state agency.]

[(f) The state agency shall assign each farmers' market association a four-digit account number and shall record it upon the agreement between the department and the association.]

[(g) After the agreement is signed by the state agency official, one copy shall be forwarded to the association and another copy sent to the WIC local agency affected. The original document shall be retained by the state agency.]

(f)[(h)]If farmers join an association after the association's agreement has been executed, the association shall complete and submit a farmer agreement for each new member farmer to the state agency.

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~~(g)~~**[(i)]** If a farmer ceases to be a member of an association, the association shall notify the state agency that the farmer will no longer be redeeming Farmers' Market Nutrition Program coupons through that association.

§31.21. Definitions. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1)-(9) (No change.)

(10) Certifying [Competent professional] authority - An individual on the staff of the local agency authorized to determine nutritional risk, **[and]** prescribe supplemental foods, and determine eligibility of a WIC applicant.

(11)-(13) (No change.)

(14) Exempt infant formula - An infant formula that meets the requirements for an exempt infant formula under § 412(h) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 350a(h)) and the regulations at 21 CFR parts 106 and 107.

~~(15)~~**[(14)]** Family - A group of related or non-related individuals who are living together as one economic unit, except that residents of a homeless facility or institution shall not be considered members of a single family.

[(15) Federal fiscal year--The 12-month period beginning October 1 of any calendar year and ending September 30 of the following calendar year.]

(16) Food instrument - A voucher, check, electronic benefits transfer card (EBT), coupon, or other document that **[which]** is used by a participant to obtain supplemental foods.

(17) Full-line grocery store - A vendor that sells a variety of food products in each of the following four food groups on a continuous basis, in addition to the foods authorized by the WIC Program: meats, poultry or fish; bread or cereal; vegetables or fruits; and dairy. "Continuous basis" means that on any given day of operation, a store offers for sale and normally displays in a public area no fewer than three different varieties of food items in each of the four food groups. A full-line grocery store may elect not to sell infant formula.

~~(18)~~**[(17)]** Guardian - An individual legally appointed and responsible to look after the affairs of a minor.

~~(19)~~**[(18)]** Homeless facility - A facility which provides meal service and is a supervised publicly or privately operated shelter (including a welfare hotel, a congregate shelter, or a shelter for victims of domestic violence) designated to provide temporary living accommodation; an institution that provides a temporary residence for individuals intended to be institutionalized; or a public or private place not designated for, or ordinarily used as, a regular sleeping accommodation for human beings.

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(20)[(19)] Homeless individual - A woman, infant, or child who lacks a fixed and regular nighttime residence; or whose primary nighttime residence is: a supervised publicly or privately operated shelter (including a welfare hotel, a congregate shelter, or a shelter for victims of domestic violence) designated to provide temporary living accommodation; an institution that provides a temporary residence for individuals intended to be institutionalized; a temporary accommodation in the residence of another individual not exceeding 365 days; or a public or private place not designated for, or ordinarily used as, a regular sleeping accommodation for human beings.

(21)[(20)] Infant - A person under one year of age.

(22)[(21)] Income - Gross income before deductions or net income after business deductions for farm or self-employed individuals.

(23)[(22)] Individual with disabilities - A person who has a physical or mental impairment that substantially limits one or more major life activities; a person who has a history or record of such an impairment; or a person who is perceived by others as having such an impairment. Major life activities include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(24)[(23)] Instream migrant farmworker - A migrant farmworker who follows a route or travels from state to state seeking agricultural work and is not currently at his or her home base.

(25)[(24)] Licensed wholesaler or distributor - A business licensed in accordance with the Health and Safety Code, Chapter 431, the Texas Food, Drug, and Cosmetic Act, and Chapter 229 of this title (relating to Food and Drug).

(26)[(25)] Local agency - An entity under contract to the State agency to provide WIC Program nutrition services or a health services region that provides WIC nutrition services.

(27)[(26)] Migrant farmworker - An individual whose principle employment is in agriculture on a seasonal basis, who has been so employed within the last 24 months, and who establishes, for the purpose of such employment, a temporary abode.

(28)[(27)] Minor - A person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes.

(29)[(28)] Newborn infant - An infant less than one month of age.

[(29) Nonprofit agency - A private agency which is exempt from income tax under the Internal Revenue Code of 1954, as amended.]

(30) Nutrition education - A benefit offered to WIC Program participants which consists of individual or group education sessions and the provision of information and educational materials designed to improve health status, achieve positive change in dietary and physical activity habits, and emphasize the relationships between nutrition, physical activity, and

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health, all in keeping with the individual's personal[,] and cultural[, **and socioeconomic**] preferences.

(31)-(35) (No change.)

(36) Pharmacy - A facility at which a prescription drug or medication order is received, processed, or dispensed under this Subtitle J, Occupations Code; Chapter 481 or 483, Health and Safety Code; or the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 801 et seq.).

(37)[(36)] Postpartum woman - A woman up to six months after termination of pregnancy.

(38)[(37)] Poverty income guidelines - The poverty income guidelines prescribed annually by the Food and Nutrition Service Agency of the United States Department of Agriculture based on the revised poverty income guidelines issued annually [and adjusted annually] by the United States Department of Health and Human Services[, effective July 1 of each year].

(39) Predominantly-WIC vendor - A vendor outlet that has, or expects to have:

(A) WIC food sales that exceed sales of foods purchased with benefits issued by the Food Stamp Program; or

(B) WIC food sales that exceed 50% of the outlet's total sales of foods that are eligible for purchase using benefits issued by the Food Stamp Program.

(40)[(38)] Pregnant woman - A woman determined to have one or more embryos or fetuses in utero.

(41)[(39)] Price region - One or more geographic areas such as counties or zip codes with reasonably similar pricing of WIC-authorized foods grouped together for establishing vendor comparison groupings. Such areas may or may not be contiguous.

(42) Primary contract brand infant formula - The specific infant formula for which manufacturers submit a bid to a State agency in response to a rebate solicitation under 42 United States Code, §1786, and for which a contract is awarded by the State agency as a result of that bid.

(43)[(40)] Proxy - Any person 16 years of age or older designated by a woman participant, or by a parent, guardian, or caretaker of an infant or child participant, to obtain and transact food instruments or to obtain supplemental foods on behalf of a participant. In certain circumstances, a proxy may be appointed by the state agency to transact food instruments for an infant, child, or participant under age 18 who is subject to disqualification but who would be at nutritional risk if benefits were terminated.

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(44)[(41)] Regulations - United States Department of Agriculture regulations, 7 CFR Part 246.

(45) [(42)] Separate economic unit - A group of individuals who indicate that they have a source of income adequate to sustain the unit and usually purchase and prepare food separately from other individuals dwelling in the same household, or a group of individuals who intend to purchase and prepare food separately from other individuals dwelling in the same household after being certified as eligible to receive benefits from the WIC Program.

(46)[(43)] Shelf price - The price normally charged all customers by a vendor for an item sold by the vendor.

(47)[(44)] State agency - The Department of State Health Services [**Texas Department of Health**] in its role as administrator of the WIC Program.

(48)[(45)] Supplemental foods - Those foods containing nutrients determined by nutritional research to be lacking in the diets of [to be beneficial for] pregnant, breastfeeding, or postpartum women, infants, and children and foods that promote the health of the population served by the WIC Program as indicated by relevant nutrition science, public health concerns, and cultural eating patterns as prescribed by the United States Secretary of Agriculture.

(49)[(46)] United States Department of Agriculture (USDA) - The federal agency which funds the WIC Program.

(50) Vendor - A sole proprietorship, partnership, cooperative association, corporation, or other business entity operating one or more stores authorized by the state agency to provide authorized supplemental foods to participants under a retail food delivery system.

(51)[(47)] Vendor account - A vendor approved by the state agency with one or more vendor outlets.

(52)[(48)] Vendor agreement - The formal and legally binding agreement between the Department of State Health Services [**Texas Department of Health**] and a vendor authorized to accept and redeem WIC Program food instruments and that may include one or more authorized store locations under the same agreement.

(53)[(49)] Vendor band - A comparison group of WIC Program vendors based on similar characteristics such as monthly WIC sales volume for each [**account or**] outlet, store size, location, number of checkout lanes, or store type.

(54)[(50)] Vendor competitive pricing - The process of comparing a vendor outlet's average costs of [the cost of a standard] WIC Program food packages [package] for a woman, infant, and/or [or] child to the average food package costs [at an outlet to the cost of an average standard food package] for the price region assigned by the state agency [where the vendor is located. Vendor accounts or outlets with similar characteristics are compared within the same price region].

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(55)[(51)] Vendor interactive training - A training session for vendors that includes a contemporaneous opportunity for questions and answers.

(56)[(52)] Vendor outlet - An individual store which operates and transacts WIC food instruments at a fixed location recognized by the U.S. postal system as an address, has an electric utility hook-up, is a store structure situated on a cement or pier-and-beam foundation, is not used simultaneously as a residence, has a minimum business area of 500 square feet, has clearly identifying signage that matches the vendor outlet name listed on the WIC Vendor Profile Application, and is walk-in accessible directly from the street or parking lot.

(57)[(53)] Verbal abuse - The verbal threat of physical abuse of local agency, state agency or vendor staff by a participant or a parent, guardian, client-designated proxy, state agency-appointed proxy, or caretaker of a participant. Rude, vulgar, or generally abusive language is not verbal abuse.

[(54) WIC-only store - A vendor outlet that primarily transacts WIC food instruments or transacts WIC food instruments totaling a sales volume greater than its Food Stamp Program sales volume or is not authorized by the Food Stamp Program.]

(58)[(55)] WIC program - The Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) authorized by the Child Nutrition Act of 1966, §17, as amended.

(59)[(56)] WIC Vendor Profile Application - A form which includes demographic, financial, and other descriptive information for each vendor outlet.

§31.22. Recipient Eligibility Requirements.

(a) An individual shall be eligible to receive services when the individual receives local agency approval after meeting all of the following requirements.

(1)-(2) (No change.)

(3) Meet the income requirements as follows:

(A) (No change.)

(B) Applicants shall provide documentation of the amount of current income received by each member of the family or separate economic unit within a family at each certification and subsequent certification as authorized by federal WIC regulations at 7 CFR §246.7 **[except as provided in this subsection]**.

[(C) Income includes the following:]

[(i) wages, salary, commissions, or fees;]

[(ii) net income from farm and non-farm self-employment;]

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[(iii) Social Security benefits;]

[(iv) dividends or interest on savings or bonds, to include interest on certificates of deposit (CD) and Individual Retirement Accounts (IRA), income from estates or trusts, or net rental income;]

[(v) public assistance or welfare payments;]

[(vi) unemployment compensation;]

[(vii) government civilian employee or military retirement or pensions, or veterans' payments;]

[(viii) private pensions or annuities;]

[(ix) alimony or child support payments;]

[(x) regular contributions from persons not living in the household;]

[(xi) net royalties;]

[(xii) lump sum payments which are considered as "new money" received in the last 12 months would include but are not limited to gifts, inheritances, lottery winnings, worker's compensation for lost income, and severance pay;]

[(xiii) student financial assistance, such as grants and scholarships, except those grants and scholarships excluded as income as listed in this section;]

[(xiv) capital gains and interest earned on the sale amount. If there was a loss on the sale, the amount of interest earned on the sale amount is counted as income. This applies only to capital gains and losses within the past 12 months. Gains from any sale prior to last 12 months shall be computed according to clause (iv) of this subparagraph; and]

[(xv) other cash income, which includes, but is not limited to, cash amounts received or withdrawn from any source including savings, investments, trust accounts and other resources which are readily available to the family.]

[(D) Exclusions from income include, but are not limited to, the following:]

[(i) any basic allowance for quarters received by military personnel residing off military installations;]

[(ii) the value of inkind housing and other inkind benefits, including, but not limited to, the employer-paid or union-paid portion of health insurance premiums or other employee fringe benefits, food, or housing received in lieu of wages;]

[(iii) lump sum payments classified as "reimbursement," such as monies received from insurance companies for loss or damage to real or personal property, such as a home or auto, and payments received from a third party to pay for a specific expense such as medical bills resulting from accident or injury;]

[(iv) operating expenses for those individuals who are self-employed. For farm income, operating expenses include, but are not limited to, cost of feed, fertilizer, seed, and other farming supplies; cash wages paid to farmhands; depreciation; cash rent; interest on farm mortgages; farm building repairs; and property taxes (but not state and federal income taxes). For nonfarm self-employed persons, operating expenses include, but are not limited to, the cost of goods purchased, rent, heat, utilities, depreciation, wages and salaries paid, and business taxes (but not personal income taxes). Applicants shall complete a WIC Program affidavit or provide written business records;]

[(v) loans, such as bank loans, which are temporarily available but must be repaid;]

[(vi) payments or benefits provided under certain federal programs or acts which must be excluded by federal law include, but are not limited to the following: reimbursements from the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970; any payment to volunteers under Title I (VISTA and others) and Title II (RSVP, foster grandparents, and others) of the Domestic Volunteer Service Act of 1973, to the extent excluded by that Act; payment to volunteers under the Small Business Act (SCORE and ACE), §8(b)(1)(B); income derived from certain submarginal land of the United States which is held in trust for certain Indian tribes; payments received under the Job Training Partnership Act; income derived from the disposition of funds to the Grand River Band of Ottawa Indians; payments received under the Alaska Native Claims Settlement Act; the value of assistance to children or their families under the National School Lunch Act, as amended; the Child Nutrition Act of 1966; and the Food Stamp Act of 1977; payments by the Indian Claims Commission to the Confederated Tribes and Bands of the Yakima Indian Nation or the Apache Tribe of the Mescalero Reservation; payments to the Passamaquoddy Tribe and Penobscot Nation or any of their members received pursuant to the Maine Indian Claims Settlement Act of 1980; payments under the Low-Income Home Energy Assistance Act, as amended; student financial assistance received from any program funded in whole or part under Title IV of the Higher Education Act of 1965, including the Pell Grant, Supplemental Educational Opportunity Grant, State Student Incentive Grants, National Direct Student Loan, PLUS, College Work Study, and Byrd Honor Scholarship programs, including any assistance received from these programs used for tuition and fees, the costs for rental or purchase of any equipment, materials, or supplies required of all students in the same course of study, and an allowance for books, supplies, transportation, and miscellaneous personal expenses for a student attending a higher education institution on at least a half-time basis, as

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determined by the institution, but not including room and board and dependent care expenses; payments under the Disaster Relief Act of 1974, as amended by the Disaster Relief and Emergency Assistance Amendments of 1989; payments received under the Carl D. Perkins Vocational Education Act, as amended by the Carl D. Perkins Vocational and Applied Technology Educational Act Amendments of 1990; payments pursuant to the Agent Orange Compensation Exclusion Act; payments received for Wartime Relocation of Civilians under the Civil Liberties Act of 1988; value of any child care payments made under the Social Security Act, §402(g)(1)(E), as amended by the Family Support Act; value of any "at-risk" block grant child care payments made under Public Law 101-508, §5081; value of any child care provided or paid for under the Child Care and Development Block Grant Act, as amended; mandatory salary reduction amount for military service personnel which is used to fund the Veteran's Educational Assistance Act of 1984 (GI Bill), as amended; payments received under the Old Age Assistance Claims Settlement Act, except for per capita shares in excess of \$2000; payments received under the Cranston-Gonzales National Affordable Housing Act, unless the income of the family equals or exceeds 80% of the median income of the area; payments received under the Housing and Community Development Act of 1987; unless the income of the family increases at any time to not less than 50% of the median income of the area; payments received under the Sac and Fox Indian claims agreement; payments received under the Judgment Award Authorization Act, as amended; payments for the relocation assistance of members of Navajo and Hopi Tribes; payments to the Turtle Mountain Band of Chippewas (Arizona); payments to the Blackfeet, Grosventre, and Assiniboine tribes (Montana) and the Papago (Arizona); payments to the Assiniboine Tribe of the Fort Belknap Indian community and the Assiniboine Tribe of the Fort Peck Indian Reservation (Montana); payments to the Red Lake Band of Chippewas; payments received under the Saginaw Chippewas Indian Tribe of Michigan Distribution of Judgment Funds Act; and payments to the Chippewas of Mississippi.]

(C)[(E)] Acceptable documentation of income are: check stubs stating current earnings; United States Internal Revenue Service form W-2 if less than 90 days old at the time of application and if reflective of current income; a signed statement from the employer; completion of WIC Program affidavit allowed in specific circumstances such as for homeless or those with no income; completion of WIC Program affidavit for self-employed individuals with no business accounting records or who are paid in cash and whose employer will not provide documentation of income; bankbook, if reflective of current income; current federal tax records; income receipt book or other accounting records if self-employed; foster child placement letter; other documentation which the local agency requests to use and which has been approved by the state agency; and the placement letter from the welfare agency legally responsible for a foster child.

(i) Only one document no more than 60 days old which accurately reflects the applicant's income from each source is required, **[such as one check stub for each source of income as long as the document is no older than 60 days]** unless the applicant only receives such documentation annually, such as a Social Security Award letter.

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(ii) Instream migrant farmworkers and their families are required to provide documentation of meeting the income requirements only once every 12 months.

(D)~~(F)~~ Certain applicants shall be deemed adjunctively income eligible as follows.

(i) Applicants who are fully eligible to receive Food Stamps benefits or who are fully eligible or presumptively eligible to receive Temporary Assistance to Needy Families benefits or Medicaid benefits.

(ii) Applicants who are members of families in which one other member is fully eligible or presumptively eligible to receive Temporary Assistance to Needy Families benefits.

(iii) Applicants who are members of families in which a pregnant woman or infant is fully eligible or presumptively eligible to receive Medicaid benefits.

(iv) Applicants shall provide documentation from one of the following categories as proof of their status as **[an applicant who is]** adjunctively income eligible; **[as follows.]**

(I) The applicant shall provide written documentation from the other benefit program which shows current eligibility in the benefit program at the time of application to the WIC Program.

(II) The applicant may grant permission for the local agency to conduct a phone or computer on-line verification from the benefit program on behalf of the client when the local agency has the capability to do so.

(v) Applicants eligible to receive Food Stamp benefits shall provide documentation that the applicant himself or herself is fully eligible to receive such benefits.

(vi) Applicants applying as adjunctively income eligible based on receipt of Food Stamps by a family member as head of household shall provide documentation that the person named as head of household for Food Stamps purposes is a member of the applicant's family and is fully eligible to receive such benefits.

(vii) Applicants eligible to receive Temporary Assistance to Needy Families or Medicaid shall provide documentation that the applicant himself or herself is fully or presumptively eligible to receive such benefits.

(viii) Applicants applying as adjunctively income eligible based on a family member's eligibility to receive Temporary Assistance to Needy Families or

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Medicaid shall provide documentation of the family member's receipt of such benefits and that the recipient is a member of the applicant's family.

(ix) Applicants eligible for adjunctive income eligibility shall verbally declare their total gross family income or net income if self-employed.

(E)~~[(G)]~~ Income eligibility shall be based on the total income of the family.

(F)~~[(H)]~~ When determining an applicant's income eligibility for WIC Program services, the local agency shall determine the size of the applicant's family as follows:

(i) All family members shall be counted except for individuals who qualify as a member of a separate economic unit.

(I) A pregnant woman shall be counted as more than one person according to the number of children she expects to give birth to. If she is expecting one child, she shall be counted as two individuals; if she is expecting twins, she shall be counted as three individuals and so on.

(II) A foster child shall be considered a separate family of one.

(ii) Persons temporarily absent from the family may be counted if the following circumstances exist:

(I) other members still consider the family to be the principal residence of the absent member;

(II) the absence does not exceed six months;

(III) the absence is for a purpose such as school, training, employment, hospitalization, or institutionalization; and

(IV) the absent member continues to exercise customary family responsibilities such as income, planning, or physical care.

(G)~~[(I)]~~ Some individuals may qualify as a separate economic unit as an exception if the unit has an adequate source of income and usually purchases and prepares food separately from other persons who live in the same dwelling or the unit intends after certification to purchase and prepare food separately from other persons who live in the same dwelling. The following shall not be certified as a separate economic unit:

(i) minor children who live with their parent or parents;

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(ii) a child under age 18 who lives with family members who serve as managing conservators and provide more than half of the child's support, and the family members state that the child is under parental control;

(iii) spouses; or

(iv) two people who live together and represent themselves to the community as husband and wife.

(H)**(J)** Individuals who have been determined eligible for WIC Program services are not required to report changes in income during certification periods.

(i) The local agency has no responsibility to monitor the continued income eligibility of the participant during the certification period.

(ii) If the local agency becomes aware of changes in income during a certification period, the participant shall be reassessed for income eligibility under the rules for determining income eligibility.

(4)-(6) (No change.)

(b) Citizenship is not a requirement for eligibility.

[(1) As long as the local agency has caseload openings, individuals who qualify for WIC Program services shall be served without regard to citizenship status.]

[(2) No individual's participation in the WIC Program may be terminated because the individual is suspected as or known to be an undocumented alien.]

[(3) WIC Program confidentiality requirements apply to all applicants and participants regardless of their citizenship status.]

§31.23. Recipients of Supplemental Food Benefits.

(a)-(d) (No change.)

[(e) Not more than one month's supplemental food benefits may be issued to a proxy.]

(e)**(f)** Proxies of participants residing in a homeless facility, temporary shelter, or institution may **[shall not]** pick up and redeem supplemental food benefits for all WIC Program participants in their respective homeless facilities, temporary shelters, or institutions **[or transact the food instruments in bulk. The proxy may act on the behalf of only one certified family]**. The state and local agencies shall ensure that adult participants are allowed to participate in the process of picking up and transacting food instruments to the greatest extent possible, within the

institutional framework, so that they are aware of the foods prescribed for them as well as the intended benefits of such foods.

(f)[(g)] Recipients of supplemental food benefits shall sign the WIC Program Supplemental Information Form prior to receiving such benefits.

(g)[(h)] Recipients of supplemental food benefits shall provide identification at each issuance of food benefits.

(h) Recipients of supplemental food benefits shall receive their benefits at the same time as they receive notification of eligibility for participation in the program.

§31.25. Participant Certification Periods.

(a) An applicant who [After eligibility] has been determined eligible [, **applicants**] shall be enrolled and certified to receive WIC Program benefits as [for a] specified in this section [length of time]. The certification period shall begin on the date the applicant is determined eligible.

(b)-(g) (No change.)

§31.26. Notification to Applicants of Ineligibility.

(a) (No change.)

[(b) When ineligibility is determined at the time of the certification determination visit, the applicant or parent, caretaker, or guardian applying on behalf of an infant or child shall be notified at that time in person.]

[(c) When ineligibility is determined after the certification determination visit, the applicant, participant, or parent, caretaker, or guardian of a participant shall be notified by mail.]

(b)[(d)] The notification shall inform the applicant or parent, caretaker, or guardian of a participant that he or she has a right to a fair hearing.

§31.27. Notification to Each Participant [**Participants**] of Certification Expiration.

(a)-(b) (No change.)

§31.28. Notification to Each Participant [**Participants**] of Termination of Certification.

(a)-(c) (No change.)

§31.29. Applicant and Participant Rights.

(a) (No change.)

(b) At the time of denial of participation or disqualification from the WIC Program, each individual shall be informed in writing of the right to a fair hearing and of the method by which a fair hearing may be requested.

(1) Any individual has the right to appeal a state agency or local agency action which results in the individual's denial of participation in **[or suspension]** or termination from the WIC Program or the assessment of an administrative claim against the individual for repayment of the cash value of improperly issued benefits.

(2) (No change.)

(3) The oral or written request shall be made within 60 days of the date the state agency mails or gives the applicant or participant the written notice of adverse action **[of denial of participation in or suspension or termination from the WIC Program or the assessment of a claim against the individual for repayment of the cash value of improperly issued benefits]**.

(4)-(5) (No change.)

(6) The hearing shall be scheduled within three weeks from the date the request is received. **[The state agency shall provide written notice of the time and place of the hearing and an explanation of the hearing procedure to the appellant at least ten days prior to the hearing.]**

(7) The convenience of the appellant will be considered **[of prime consideration]** in the selection of the time and place of the hearing.

(8)-(15) (No change.)

(c) (No change.)

§31.30. Participant Fraud and Abuse.

(a) (No change.)

(b) If [In all cases where it is found by] the state agency or the Office of the Inspector General, Health and Human Services Commission, determines that a participant or parent, guardian, client-designated proxy, state agency-appointed proxy, or caretaker of a participant has **[unlawfully]** received benefits unlawfully due to WIC Program abuse, including but not limited to dual participation, the state agency may **[has the option to]** refer the matter for criminal prosecution.

(c) Program violations means any intentional act of an applicant, **[a]** participant, parent, guardian or caretaker of an infant or child applicant or participant, client-designated

proxy, or state agency-designated proxy that violates Federal or State statutes, regulations, rules, policies or procedures governing the WIC Program. Violations include, but are not limited to, intentionally making a false or misleading statement; intentionally misrepresenting, concealing, or withholding facts to obtain benefits; exchanging food instruments or food for cash, credit, non-food items, or unauthorized foods, including foods in excess of that authorized; threatening to harm or physically harming local agency, vendor or state agency staff; and simultaneous participation in the Program in one or more than one WIC clinic or participation in the Commodity Supplemental Food Program during the same period of time.

(d) (No change.)

(e) Upon a final determination by the Office of the Inspector General, Health and Human Services Commission, **[department's Office of Criminal Investigations]** that a program violation has occurred and that final disposition of any criminal prosecution has occurred, the following mandatory disqualifications shall apply.

(1) (No change.)

(2) For an offense where a participant illegally received benefits at more than one WIC office and the state agency or the Office of the Inspector General, Health and Human Services Commission, assesses a claim for such dual participation, the participant shall be disqualified for one year.

(3) When the state agency or the Office of the Inspector General, Health and Human Services Commission, assesses a second or subsequent claim of any amount, the participant shall be disqualified for one year.

(f) Upon a final determination by the Office of Inspector General, Health and Human Services Commission, **[department's Office of Criminal Investigations]** that a program violation has occurred that [which] does not warrant a one year mandatory disqualification **[has occurred]** and no appeals from [final disposition of] any criminal prosecution remain [has occurred], the following sanctions shall apply.

(1)-(6) (No change.)

(g) Exceptions to disqualification:

(1) The state agency or the Office of Inspector General, Health and Human Services Commission, may decide not to impose a disqualification if, for violations which resulted in a claim assessed by the state agency against the participant, parent, guardian, client designated proxy, state agency-appointed proxy, or caretaker of a participant, full restitution is made within 30 days of receipt of a letter demanding repayment or a repayment schedule is agreed on.

(2) (No change.)

(3) **[At the recommendation of the local agency's competent professional authority, the]** The state agency may issue a waiver to appoint a person as a special proxy to transact food instruments and receive nutrition education for an infant, child, or participant under age 18 when the infant, child, or participant under age 18 will incur a serious health risk from the suspension of benefits.

(h) The state agency or the Office of the Inspector General, Health and Human Services Commission, shall attempt to recover, in cash, the value of the benefits received by a participant or the parent, guardian, client-designated proxy, state agency-appointed proxy or caretaker of a participant as a result of participant abuse.

(1) The state agency or the Office of the Inspector General, Health and Human Services Commission, shall determine the amount of the benefits improperly received by a participant through an independent review of local agency records and such other procedures as the state agency considers necessary under the specific circumstances.

(2) (No change.)

(3) In cases involving an administrative claim but no criminal prosecution, the Office of the Inspector General, Health and Human Services Commission, **[state agency]** shall notify the participant or parent, caretaker, or guardian of a participant in writing that a financial claim has been established and shall request repayment of an amount equal to the value of the benefits improperly received. The written notification shall include the reasons for the claim, the value of the benefits improperly received, **[and]** the participant's right to a fair hearing, and shall state that the participant or parent, caretaker, or guardian of a participant may be subject to disqualification.

(i) (No change.)

§31.31. Selection of a Local Agency as a WIC Provider.

(a) (No change.)

(b) The state agency shall establish an affirmative action plan each year to rank order each county's relative need for WIC Program services based on the total number of potentially eligible persons in each county.

[(1) The following criteria shall be used to rank each county.]

[(A) Estimates of the proportion of infants below 185% of the federal income guidelines by ethnic group; and]

[(B) Total live births for each county and ethnic group for the previous five years.]

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[(2) The affirmative action plan shall be used to identify the top one-third of Texas counties (1 through 85) as high priority due to their status as having the most unserved potentially eligible persons.]

[(3) The most needy one-third of Texas counties shall be designated as targets for the most extensive outreach efforts by the state agency when soliciting for local agencies.]

[(A) If no local agency has applied to provide services, the state agency shall publish a notice in the media of that area to solicit applications from other potential agencies.]

[(i) The state agency shall include in the notice a brief explanation of the program, a description of the priority system, and a request that interested local agencies notify the state agency of their interest within 30 days.]

[(ii) The state agency shall also contact all potential agencies in the area to ensure they are aware of the opportunity to apply for selection as a local agency.]

[(B) If no local agency which meets the criteria for first priority expresses an interest, the state agency may consider applications from agencies in the lower priorities.]

[(C) The state agency shall fund new local agencies in conformance with the sequential ranking of the affirmative action plan and the local agency priority system.]

(c) All WIC Program initiation and expansion shall be executed utilizing a request for proposal (RFP) in accordance with state agency policy, state law, USDA Food and Nutrition Services Instruction 802-1, and the state agency's approved affirmative action plan [, **and 10 Texas Administrative Code, Chapter 199, Electronic Business Daily,] under one of the following conditions:**

(1)-(2) (No change.)

(3) a state agency health services region [Public Health Region**] wishes to transfer direct WIC Program services to a local agency; or**

(4) (No change.)

(d) The state agency shall evaluate proposals to serve as a WIC Program local agency submitted in response to an RFP. [according to the following criteria:**]**

[(1) the ranking of the applying agency in the established priority system;]

[(2) the need for additional WIC Program services in the geographic area based upon review of the number of current participants by priority and the total number who receive services in comparison to the total number of potential eligible participants in an area, and the local agency applicant's estimate of the number to be served;]

[(3) the clinic locations proposed in an application relative to the existing WIC Program local agency clinics operated by other WIC Program authorized local agencies;]

[(4) overall estimated costs of operating the new local agency in comparison to the estimated revenue available to cover local agency costs;]

[(5) the staffing pattern of the local agency to support WIC Program services proposed by the applying local agency;]

[(6) planned hours of operation to include extended clinic hours which are defined as weekends and outside of traditional hours of 8:00 a.m. to 5:00 p.m., Monday through Friday;]

[(7) the availability of other medical services through the applicant agency or by referral; and]

[(8) specific application criteria in the request for proposal.]

(e) The state agency shall advise respondent agencies of the status of their applications to provide WIC Program services in accordance with the schedule of events in the public notice and the RFP. **[At a minimum, the schedule of events shall provide for written notification of approval or disapproval to the applicant agencies within 30 days of the closing date for acceptance of responses to the RFP.]**

(f) (No change.)

[(g) When a local agency submits an incomplete application for participation either unsolicited or at the request of the state agency as a result of an emergency situation, the state agency shall notify the applicant within 15 days of the receipt of the incomplete application of the additional information needed. The state agency shall notify the applicant agency in writing within 30 days of receipt of a complete application of the approval or disapproval of the application.]

§31.32. Selection of Vendors for WIC Initial Authorization for Participation.

(a) Except as provided by subsection (e) of this section, the state agency shall evaluate an application for participation as a vendor only upon receipt and verification of the following:

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(1) a written request for evaluation, which must contain at a minimum, the store name, physical address, name of a contact person, and a phone number at which the contact person can be reached;

(2) a valid Food Stamp Program authorization number for the applicant vendor outlet that the vendor agrees to maintain throughout the period of the agreement with the state agency, unless the vendor declares in writing its intent to provide no WIC-authorized foods other than exempt infant formula; and

(3) a written declaration signed by the applicant or the applicant's authorized representative stating the percentage of total food sales the applicant expects to derive from redemption of WIC food instruments. As used in this paragraph, "total food sales" is defined as the sale of all foods that can be purchased with benefits issued by the Food Stamp Program.

~~(b)~~**[(a)]** A representative from the state agency or the nearest local agency shall perform an on-site evaluation of a vendor outlet applying for authorization to redeem WIC food instruments.

(1) The state or local agency representative shall complete a vendor evaluation form during the on-site visit to the vendor outlet indicating vendor type and size, the type of WIC-authorized foods in stock and their shelf prices, if WIC food products are stocked and available for sale, and whether or not the outlet is a full-line grocery store. The state or local agency representative shall document on the Non-WIC Staple Foods Group Availability form the quantity of foods intended to be offered for sale in the following four food groups: meat, poultry, or fish; breads or cereals; fruits or vegetables; and dairy.

(2) The state or local agency representative shall recommend approval or disapproval of the vendor's application based on the observations during the **[store]** visit to the outlet.

(3) An outlet **[The owner or manager of a store]** representative shall have the opportunity to review the information on the vendor evaluation form and shall sign the form to acknowledge accuracy of shelf prices listed at the time of the evaluation. The evaluator shall provide a copy of the form, including the date, local agency number, and the name of the evaluator, to the vendor at the time of the on-site **[in-store]** evaluation.

(4) If a representative from the state or local agency visits a vendor outlet to conduct the required on-site evaluation at the time previously agreed upon, and outlet cannot be evaluated at that time, the vendor shall be deemed to have failed the evaluation, and the vendor shall not be authorized.

~~(c)~~**[(b)]** The state agency shall approve **[base its decision to authorize]** a vendor's initial authorization application upon compliance with **[vendor on]** the following criteria:

(1) The vendor has a current Food Stamp Program authorization and is in good standing.

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(2) The vendor has submitted the declaration required under subsection (a)(3) of this section, and the outlet offers for sale non-WIC food items that include meat, poultry, or fish; vegetables or fruits; breads or cereals; and dairy as observed during the on-site evaluation.

(3)[(1)] The vendor's shelf prices for approved WIC foods in stock are competitive for the price region.

(4)[(2)] The vendor has sufficient quantities of authorized milk, evaporated milk, cheese, cereal, contract infant formula, contract infant cereal, eggs, peanut butter, and dried beans.

(A) A vendor that elects **[pharmacy may elect]** to provide only exempt infant formula or medical foods: **[the designated contract milk and soy formulas and special formulas.]**

(i) shall not be authorized to redeem WIC food instruments for other WIC-authorized foods, including primary contract brand infant formula; and

(ii) shall not be required to submit a valid Food Stamp Program authorization.

(B) A vendor may elect not to provide infant formula.

(C) A pharmacy that elects to provide only exempt infant formula or medical foods shall not be designated a predominantly-WIC vendor.

(D)[(C)] For vendors who elect to provide all authorized foods, the following amounts of each food type shall constitute sufficient quantities:

(i) a total of at least 108 ounces of adult cereal, including 36 ounces each of at least three of the following types of cereal: oat, corn, wheat, rice, and multi-grain;

(ii) at least six dozen Grade A or AA large, medium, or small size eggs;

(iii) a total of at least 18 containers of juice, including at least two varieties of juice in 46-ounce fluid cans and/or 12-ounce frozen cans;

(iv) a total of at least six pounds of cheese;

(v) a total of at least 13.5 **[nine]** gallons of milk, some of which must be available in one-half gallon containers and that includes whole milk and at least two of the following types of milk: low-fat, fat-free, and buttermilk;

(vi) at least three one-pound bags of dry beans;

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- (vii) at least three 18-ounce jars of peanut butter;
- (viii) at least eight 12-ounce cans of evaporated milk;
- (ix) at least 31 cans each of milk and **[or]** soy concentrate infant formula (contract brand) and **[either]** nine **[eight]** cans each of milk-based powder formula and **[or nine cans of]** soy powder formula (contract brand); and
- (x) at least two 8-ounce boxes or one 16-ounce box of infant cereal.

(5)[(3)] The vendor provides milk in gallon and half-gallon containers and juice in containers of 46-ounce fluid or 11.5 or 12-ounce frozen **[containers]**.

(6)[(4)] The vendor's shelf prices do not exceed the maximum prices on WIC food instruments.

(7)[(5)] The recommendation by the state or local agency representative who conducted the on-site evaluation.

(8)[(6)] The vendor has a retail food operations permit or food manufacturer's permit from the applicable city, county, district, or state health authority.

(9)[(7)] The vendor's outlet **[store]** is clean, with fresh merchandise (no expired food items).

(10)[(8)] The vendor has no apparent conflict of interest with the local agency in the vendor's service area or with the state agency.

(11)[(9)] The vendor has posted prices for food items.

(12)[(10)] If applicable, the vendor's history of compliance with WIC Program rules, policies, and procedures.

(13)[(11)] The vendor has business integrity as indicated by a lack of activities during the past six years including fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice, or tax evasion.

(14)[(12)] The vendor is not currently disqualified from the Food Stamp Program or has not been assessed a civil money penalty for hardship by the Food Stamp Program and the disqualification period that would otherwise have been imposed by the Food Stamp Program has not expired unless denying WIC Program authorization would result in inadequate participant access.

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(15)~~[(13)]~~ The vendor operates and will transact food instruments at a fixed location **[unless a mobile store is necessary to meet special needs as described in the state agency's state plan and approved by USDA]**.

(16)~~[(14)]~~ The vendor has participated in vendor interactive training.

(17)~~[(15)]~~ If a vendor elects to provide infant formula, the vendor shall, upon request, make available to department inspectors invoices or receipts documenting purchase of all infant formula directly from entities listed in subparagraphs (A)-(C) of this paragraph and shall agree to purchase all formula only from:

(A) food wholesalers currently licensed in Texas in accordance with the Health and Safety Code, Chapter 431, the Texas Food, Drug, and Cosmetic Act, and Chapter 229 of this title (relating to Food and Drug);

(B) food manufacturers registered with the U.S. Food and Drug Administration; or

(C) retail food stores holding permits in accordance with the Health and Safety Code, Chapter 437.

(d)~~[(c)]~~ If the state agency disapproves the application by a vendor for authorization, the reasons for the disapproval shall be provided to the vendor in writing.

(e)~~[(d)]~~ Vendors who apply for authorization who have been evaluated twice within a six-month period and denied approval both times shall not be evaluated again until at least six months from the last evaluation.

(f)~~[(e)]~~ In the event a vendor purchases or acquires an outlet **[a store location or business which]** that was in the process of being disqualified or which is disqualified from the WIC Program at the time of acquisition, the vendor's application for that outlet **[store]** location **[or business]** shall not be considered until the state agency makes a determination that the sale was a bona fide arms-length transaction. The state agency will make this determination no later than six months from the date of application. If the state agency determines that the transfer was not an arms-length transaction, the application shall not be considered until the disqualification period has been served.

(g)~~[(f)]~~ If the state agency has disqualified the previous owner of an outlet **[a store location or business]** for noncompliance or notified the previous owner that the outlet **[store location or business]** has been disqualified due to noncompliance, a new owner's application for that outlet **[store location or business]** shall not be considered until at least six months from the expiration date of the previous owner's last vendor agreement unless the state agency makes an earlier determination that the sale was a bona fide arms-length transaction.

[(g) The state agency may waive the requirement for an on-site evaluation when a grocery chain comprising 20 or more outlets authorized to participate in the WIC Program

purchases or merges with another chain with 20 or more authorized outlets if the merger or purchase does not materially change the store's staff or pricing structure.]

[(h) Upon request, the state agency may provide an applicant vendor with tentative authorization to redeem WIC food instruments starting the day the store opens.]

[(1) To obtain tentative authorization, the vendor shall comply with all of the following criteria:]

[(A) The owner of the applicant store owns ten or more stores that have been participating in the WIC Program under the current ownership for at least the six-month period prior to application for authorization.]

[(B) For the six month period prior to application for authorization, fewer than 20% of the applicant's participating stores' authorizations have been terminated for exceeding the competitive pricing criteria for either the woman/child package or the infant food package for their respective price regions and vendor bands.]

[(C) None of the participating stores has been disqualified from program participation for two or more months within the 12-month period prior to application for authorization.]

[(D) The applicant store notifies the state agency prior to the official opening date.]

[(E) The applicant store's manager or assistant manager acknowledges receipt and understanding of the vendor agreement including its attachments, training materials and manuals, the allowable foods list, and vendor rules and policies.]

[(F) The applicant store's manager or assistant manager has scored at least 70% on a written test provided by the state agency and returned to the state agency no later than five days prior to the applicant store's opening date.]

[(2) If, after evaluation, a store which has received tentative authorization from the state agency does not meet all authorization criteria, the store shall be notified of its tentative agreement expiration date and instructed to discontinue redeeming the WIC Program food instruments. The state agency shall honor properly redeemed food instruments from the opening date until the tentative agreement expiration.]

[(i) On a temporary basis, the state agency may consider and approve applications from new vendors for the following reasons:]

[(1) the vendor has been authorized to accept Food Stamps;]

[(2) the disqualification of an existing authorized vendor in a local agency service area would create inadequate access for WIC Program participants;]

[(3) a currently-authorized vendor outlet(s) changes ownership; or]

[(4) authorization of a new vendor would result in a significant cost advantage to the WIC Program.]

(h)[(j)] The state agency may deny an outlet's application to participate as a vendor if an owner, partner, principal stockholder, officer, director, manager, or operator of the applicant was an owner, partner, principal stockholder, officer, director, manager, or operator of another vendor outlet, which has been disqualified or which has violated WIC Program vendor agreement procedures, policies, rules or regulations.

(i)[(k)] The state agency may hold an authorized vendor individually responsible for previous violations by an owner, partner, manager, or principal stockholder of the vendor when considering renewal of the vendor's agreement or future applications for vendor agreements.

(j) [(l)] A history of noncompliance with the WIC Program's federal and state statutes and regulations, rules, policies, and procedures shall be considered by the state agency when evaluating an authorized vendor's application for authorization of new outlets. The state agency will not authorize new outlets for a vendor where 50% of the vendor's outlets are in a disqualification or termination status at the time of a request to authorize new outlets.

(k) A vendor deemed ineligible for initial authorization to participate in the WIC Program due to noncompliance with the requirements of subsection (c)(2) of this section may be authorized if the vendor's participation is needed to address inadequate participant access to WIC-authorized stores, as determined by the state agency under WIC Policy WV:03.0.

(1) After the vendor's first four months of operations as an authorized vendor, the state agency shall assess the vendor to determine whether the vendor's WIC food sales exceed 50% of sales of all foods that can be purchased using benefits issued by the Food Stamp Program.

(2) If the vendor's WIC food sales exceed 50% of sales of all foods that can be purchased using benefits issued by the Food Stamp Program during the first four months of operations, the vendor agreement shall be terminated. The vendor shall receive written notification of the termination at least 15 days prior to the effective date.

(3) Termination of the vendor agreement shall not be held in abeyance during the pendency of an appeal or hearing.

§31.33. Selection of Vendors for Reauthorization for Participation. **[(a)]** Vendors with a current vendor agreement who seek reauthorization shall reapply and shall be evaluated for issuance of a subsequent vendor agreement under WIC Program procedures, policies, rules, and regulations

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and shall be reauthorized unless notified in writing by the state agency at least 15 days before expiration of the vendor agreement.

[(b) Prior to reauthorization, the state agency shall assess and review the qualifications of all vendors to assure that each continues to meet the WIC Program's goals. Criteria utilized in assessment and determination of qualifications for reauthorization include, but are not limited to.]

[(1) Competitive prices for the price region. A vendor's prices shall be considered competitive if the combined prices for the items included in the standard woman/child and/or infant food package do not exceed 108% of the price region food package averages for the vendor's band.]

[(2) Volume of WIC sales. The vendor's volume of WIC sales exceeds \$300 a month. If monthly sales fall below \$300 a month for three consecutive months prior to the time of the vendor agreement reauthorization evaluation, the vendor agreement may not be renewed. If the state agency allows the Vendor Agreement to expire, the state agency will not consider the vendor's application to participate for six months after the expiration of the vendor's prior Vendor Agreement.]

[(3) Previous compliance with WIC Program procedures, policies, rules, and regulations. The vendor has satisfactorily complied with food instrument redemption and submission procedures, policies, rules, and regulations.]

[(4) Continuing to meet selection criteria. The vendor continues to meet the selection criteria as stated in 7 CFR Part 246, this section, and in §31.32 of this title (relating to Selection of Vendors for WIC Initial Authorization for Participation).]

[(5) Use of the WIC acronym or WIC logo. If the state agency determines that the vendor failed to comply with the prohibitions on the use of the WIC acronym or WIC logo, after having received a written warning, the state agency will disqualify the vendor for three months. The state agency will accept a civil money penalty in lieu of disqualification.]

[(6) Failure to attend training. The vendor agreement shall not be renewed if a vendor or vendor representative has not attended a WIC vendor interactive training within three years from the last date a representative attended a WIC vendor interactive training.]

[(c) A history of noncompliance with WIC Program procedures, policies, rules, and regulations shall be considered by the state agency in determining if the vendor is eligible for a subsequent contract.]

[(d) The state agency may allow a vendor's agreement to expire and not be renewed if the vendor has a history of noncompliance with provisions in the vendor agreement or the WIC Program procedures, policies, rules, and/or regulations.]

[(1) Expiration of the vendor agreement is not subject to appeal.]

[(2) In the event the vendor's agreement has been allowed to expire due to previous noncompliance, a vendor's request for reauthorization shall not be considered until at least six months from the expiration date of the vendor's last agreement.]

[(e) All vendors must have a retail food operation permit or food manufacturers' permit from the applicable city, county, district, or state health authority.]

§31.34. Calculation and Use of Vendor Competitive Pricing Data.

(a) The state agency shall use the following calculation to determine whether a vendor's prices are competitive with those of similar vendors in the price region.

(1)-(6) (No change.)

(7) The state agency may reassign a vendor to an alternative comparison group when the vendor is a **[, such as a high-volume,]** national discount superstore, **[or a [primarily WIC-only store], a pharmacy or vendor that has elected to provide only exempt infant formula, a predominantly-WIC vendor, a military commissary, a vendor that is not characteristic of other vendors in the band, a** **[; when the]** vendor that is the only store in a rural area within the price region, **[;]** or a **[when the]** vendor that is the sole occupant of a band.

(b) (No change.)

§31.35. Vendor Agreement with the State Agency.

(a) (No change.)

(b) A vendor agreement may cover more than one outlet. The disqualification of one outlet does not affect the authorization of other outlets covered by the vendor agreement.

(c) The cessation of operations at an authorized vendor outlet for any reason terminates the agreement for that outlet, including moving the outlet from one location to another. Vendors who change the location of an outlet are required to submit an application for authorization of the new location in accordance with the provisions of §31.32 of this title (relating to Selection of Vendors for WIC Initial Authorization for Participation).

(d)[(b)] A change of ownership of an authorized outlet or account terminates the agreement between the state agency and the vendor. A change of ownership occurs when all, or substantially all, of the property or assets of a vendor are acquired by a purchaser in a bona fide arms-length transaction.

(1) In the event a store location/business under previous ownership was disqualified or is in the process of being disqualified at the time of acquisition, the new owner's application for that store location/business shall not be considered until the state agency makes a

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determination that the sale was a bona fide arms-length transaction. The state agency will make this determination no later than six months from the date of application. If the state agency determines that the transfer was not a bona fide arms-length transaction, the application shall not be considered until the disqualification has been served.

(2) If the state agency has notified the previous owner that the vendor's agreement for a store location/business shall be allowed to expire, the new vendor's application for that store location/outlet shall not be considered until at least six months from the expiration date of the previous vendor's last agreement unless the state agency makes an earlier determination that the sale was a bona fide arms-length transaction.

(3) If a store/location under previous ownership is not disqualified or is not in the process of being disqualified at the time of acquisition, and/or the previous owner has not been notified that the vendor agreement for that store location/business will be allowed to expire, and the acquiring party is in compliance with the rules, regulations, and vendor qualification criteria of the WIC Program, the acquiring party may, upon request, be considered for authorization **[authorized]** as a WIC Program vendor.

(A) The applicant vendor must submit a written notification **[affidavit]** stating that a change of ownership has been effected and duly executed by the seller and purchaser or their duly authorized officers or other agents.

(B) The notification **[affidavit]** shall include, at a minimum, the following information and any other information the state agency deems necessary: name and business address of the seller; name and business address of the purchaser; WIC vendor account number and outlet number, if applicable; name(s) and street address(es) of the outlet location(s); effective date of ownership change; and State of Texas Comptroller tax number of new owner.

(C) The authorized vendor shall provide the state agency with written notification prior to the sale, including the date the outlet being sold will cease to accept WIC food instruments.

~~(e)~~**[(c)]** WIC food instruments redeemed at an applicant store shall not be paid until the store has been duly authorized, including completion of an on-site evaluation, with recommended approval by the local agency, or tentative authorization by the state agency, execution of the vendor agreement and vendor profile, and assignment of an account/outlet number by the state agency.

~~(f)~~**[(d)]** A vendor's unilateral termination of a vendor agreement after receipt of notification by the state agency of a violation shall not deprive the state agency of jurisdiction to impose sanctions for WIC Program violations.

~~(g)~~**[(e)]** The vendor agreement does not constitute a license, since a vendor does not require the state agency's approval to engage in the retail grocery business in Texas and the vendor would not effectively be deprived of this right in the absence of WIC Program authorization.

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(1) The vendor agreement conveys no property interest since federal law does not give rise to a legitimate claim of entitlement for vendors.

(2) The terms of authorization are established in the vendor agreement between the state agency and the vendor, and the contractual relationship ends with the expiration of the vendor agreement.

(3) The state agency as well as officers, agents, and employees of the state agency are not responsible for losses incurred by a vendor as a result of the expiration of the vendor agreement.

§31.36. The Right of a Vendor or a Local Agency to Appeal.

(a)-(d) (No change.)

(e) The written request of a [A] local agency or vendor must be received by [shall provide] the state agency [with a written request for a hearing] within 15 days of the receipt by the local agency or vendor of the notice of denial or adverse action. The written request shall, at a minimum, describe the action being appealed. Requests for hearing may be submitted by facsimile.

(f)-(k) (No change.)

§31.37. Selection of Allowable WIC Program Supplemental [Allowable] Foods.

(a)-(k) (No change.)

(l) Additional criteria for each food type are as follows:

(1) Milk. Milk shall be:

(A) (No change.)

(B) whole, low-fat, or fat-free (nonfat) evaporated cow's milk fortified with vitamins A and D to meet the federal standards; and/or

(C) (No change.)

(2)-(5) (No change.)

(6) Beans/Peas/Lentils. Beans, peas, and lentils shall be dry with the exception of canned beans/peas/lentils [beans] which may be authorized only for the homeless food package.

(7)-(11) (No change.)

Agency Unit/Section/Division Nutrition Services Section / Family and Community Health Services Division	Council Meeting Date September 15, 2005
Agency Program Contact Valerie Wolfe, Nutrition Services	Telephone No. 512/458-7111 ext. 2072
Rule Topic Amendments and a Repeal to 25 TAC Chapter 31, Subchapters B and C, relating to the Farmers' Market Nutrition Program (FMNP) and the Special Supplemental Nutrition Program for Women, Infants, and Children.	

1. Rule Summary.

(Briefly summarize the rule change and why the rule may or may not have fiscal implications.)

These are amendments and a repeal to rules concerning the Farmers' Market Nutrition Program (FMNP) and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). The TAC provisions affected will be Title 25 TAC, Chapter 31, Subchapters B and C. The rules are being reviewed and considered for re adoption in accordance with the four-year review as required by Government Code, §2001.039 for August 2005 and to comply with provisions of Public Law 108-265, the Child Nutrition and WIC Reauthorization Act of 2004, regarding changes to the definitions of nutrition education and supplemental foods and the requirements for management of retail grocers and pharmacies who apply to participate in the program. In addition, the amendments are consistent with the federal 2005 Consolidated Appropriations Act that prohibits the allocation of administrative funds by USDA to state agencies operating WIC programs that authorize any new vendors (retail grocers) if it is expected that more than 50% of the vendors' annual revenue from food sales will be from WIC sales. USDA has informed the department that the 2006 appropriations act is expected to contain the same language. Specifically, both acts address the proliferation of stores that sell only WIC-authorized foods ("WIC-only stores") and national data that confirms many of these stores charge higher prices on average than other retail full-line grocery stores. The amendments to the rules reflect USDA directives that require states by December 30, 2005 to establish a vendor peer group system that distinguishes vendors that derive 50 percent or more of their annual food sales revenue from the sale of supplemental foods to WIC participants from other vendors; ensure that reimbursement levels for vendors that derive 50 percent or more of their annual food sales revenue from WIC sales are held to prices no higher than the average charged by all other stores; and ensure that new "above-50% vendors are not authorized. Other amendments are being proposed to increase administrative efficiency, to make minor wording changes, to correct errors, and to clarify the content of the rules.

There may be fiscal implications for vendors who must comply with the rules; however, these costs cannot be determined because there is no way to estimate the number of new and currently authorized vendors who will be found to be an "above-50% or more vendor."

There will be no fiscal impact to DSHS. All activities required by the amendments will be performed by existing department staff and with existing funding. Any savings resulting from lower prices charged by some vendors will only enable the department to serve additional recipients.

There are no fiscal implications to state or local governments because they will not have to change their practices to comply with the rule. The amendments that relate to the FMNP clarify and update the rule to increase the limit for client benefits to a maximum of \$30 from \$20 as recently authorized by Public Law 108-265, the Child Nutrition and WIC Reauthorization Act of 2004. All of the changes are currently in practice so there is no change for Farmers' Market Associations who must comply with the rule.

2. Fiscal Impact.

Does the rule have foreseeable fiscal implications to either costs or revenues of state government for the first five years the rule is in effect?

☐ Yes ☒ No If yes, complete the following:

- (a) If there are estimated additional costs to the department, explain (1) what new responsibilities will be required; (2) what additional staff will be needed (numbers and classifications); and (3) what other expenses, such as capital or professional services, will be required. Explain any key assumptions that will be needed to reach the figures in the chart in 2(d).

- (b) If there is an estimated reduction in costs, explain how the reductions will be accomplished.

- (c) If there is an estimated increase in revenue, describe the source and amount. If there is an estimated loss of revenue, describe the source and amount.

Note: Staff may provide the information in (d) on a separate spreadsheet. If spreadsheet is attached, please check here: ☐

(d)	1. Fiscal Year 20__	2. Fiscal Year 20__	3. Fiscal Year 20__	4. Fiscal Year 20__	5. Fiscal Year 20__
Estimated Additional/Reduction in Cost (specify reduction in parenthesis)					
STATE FUNDS					
FEDERAL FUNDS					
OTHER FUNDS					
TOTAL:					
Estimated Increase/Loss of Revenue (specify loss in parenthesis)					
STATE FUNDS					
FEDERAL FUNDS					
OTHER FUNDS					
TOTAL:					

3. Local Government Impact.

Does the rule have foreseeable positive or negative fiscal implications to either costs or revenues of local governments for the first five years the rule is in effect?

☐ Yes ☒ No If yes, enter the amounts for each of the five years and explain key assumptions you used to reach the figures.

4. Small Businesses or Micro-Businesses Impact.

Does the rule have ANY adverse economic effect on small businesses or micro-businesses* (regardless of whether it will have an adverse effect on businesses in general)?

☒ Yes ☐ No If yes, complete 4B–E. If no, complete 4A.

* A small business is a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees OR less than \$1,000,000 in annual gross receipts.

A micro-business is a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has 20 or fewer employees.

- A. If the rule **will not** have an adverse economic effect on either small businesses or micro-businesses, or both, explain why there will be no adverse effect on one or both.

Complete (B)-(E) if rule will have an adverse economic effect on small businesses or micro-businesses or both.

Note: You must discuss both small businesses and micro-businesses in your analysis regardless of whether the rule will have an adverse economic effect on either one or both.

- B. Explain why there will be an adverse economic effect, such as new fees, reduced revenues, or new regulatory requirements that will increase the cost of doing business.

After adoption of these rules, both small and micro-businesses initially authorized as vendors who may accept WIC Program food benefit instruments (vouchers and/or electronic benefit transfer smart cards) and who are subsequently determined to derive more than 50% of their revenue from total food sales from redemption of WIC food instruments will have their authorization status terminated. However, no small businesses, micro-businesses, or persons are required to comply with these sections as amended in order to operate a retail grocery business. Vendors authorized prior to adoption of this rule will be reviewed annually for a determination of the percentage of revenue from food sales represented by WIC sales. Small and micro-businesses currently authorized and determined to be a "predominantly-WIC" store, may have to lower their prices to be considered competitively priced in order to continue to be authorized. The probable economic cost to both vendors initially authorized and vendors reauthorized after rule adoption cannot be quantified because the number of such businesses, if any, that will apply for initial authorization or find it necessary to lower prices for WIC foods cannot be estimated. Nor can the dollar amounts of any price reductions for WIC foods be estimated because price comparison peer bands vary across the state.

- C. Give an analysis of the cost to small businesses or micro-businesses of complying with the rule. Explain what assumptions you used to calculate these projected costs (for example, a survey of randomly selected assisted living facilities).

These costs cannot be estimated. See item B. above.

- D. Compare the cost to small businesses or micro-businesses of complying with the rule with the cost to the largest businesses affected by the rule, analyzing, when possible:

- cost per employee,
- cost per hour of labor, or
- cost per each \$100 of sales.

These costs cannot be estimated for small, micro, or the largest businesses affected by the rule as explained in item B. above.

- E. Give an analysis of whether it is legal and feasible to reduce the economic effect of the rule on small businesses or micro-businesses, while still accomplishing the intent of the state or federal law being implemented with the rule.

The proposed amendments follow specific policy and directives issued by USDA, WIC's federal grantor, regarding the implementation of Public Law 108-265 that amended the Child Nutrition Act of 1966 governing the WIC Program. Therefore, the rule is proposed with as much latitude as possible and there are no options to reduce the potential for an adverse economic impact on small/micro businesses.

5. Other Cost Impacts.

If there will be costs to persons who must comply with this rule change, other than costs identified in preceding sections, enter estimated costs for the first five fiscal years of implementation:

FY 1	FY 2	FY 3	FY 4	FY 5

Explain assumptions used to arrive at these costs.

**6. Fiscal Impact on Local
Employment:**

☒ Rule **will not** have an impact.

☐ Rule **will** have an impact. You must complete an Economic Impact Request and submit it to TWC at least 30 days before the Council meeting.

7. Takings Impact Assessment.

Does the proposed rule create a burden on private “real property” (i.e. real estate or the buildings and other structures attached to real estate)?

☐ **Yes** ☒ **No** If **yes**, contact Legal **immediately** to determine if you are required to complete a Takings Impact Assessment.

Approvals

_____ Signature – Budget Analyst (original signature on file)	_____ Date	_____ Telephone No.
_____ Signature – Budget Director (original signature on file)	_____ Date	_____ Telephone No.
_____ Signature – Chief Financial Officer (original signature on file)	_____ Date	_____ Telephone No.
_____ Signature – Deputy Executive Commissioner (as appropriate) (original signature on file)	_____ Date	_____ Telephone No.